

**The Bare Minimum That City Attorneys Need To Know
About the Renewed Municipal NPDES Permits for
Storm Water and Urban Runoff in Southern California**

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The recently adopted renewed municipal NPDES permits that regulate pollutants discharged from storm sewers in Southern California have added significant new responsibilities for city attorneys to ensure that their city implements and enforces the new programs set forth in these permits. Municipal NPDES permits and the steadily increasing control measures imposed by State Water Resources Control Board (the “State Board” or “SWRCB”), through its individual Regional Water Quality Control Boards (the “Regional Boards”), have been among the most controversial and hotly contested environmental issues in Southern California over the last ten years. These efforts have generated a significant amount of administrative and other litigation. While these permits raise many complex technical and legal issues, the purpose of this paper is to identify those portions of the new permits that will require the direct involvement of the attorney who ultimately will be required to certify that the city has sufficient legal authority to implement and enforce its terms through municipal ordinances.¹

In particular, city attorneys will be directly involved in implementing three primary requirements of the new permits:

- (1) Amending their city’s existing storm water ordinances to include any new requirements dictated by the new NPDES permits;
- (2) Ensuring that their city’s planning processes are modified to conform to the permits’ development and construction requirements, including amending the city’s General Plan and CEQA review procedures; and
- (3) Enforcing permit requirements through inspections of businesses and construction sites, and other enforcement actions.

A. BACKGROUND

Municipal separate storm sewer systems (“MS4’s”) were typically designed as flood control systems to route rainwater quickly off the streets during heavy storms. Runoff that ends up in storm drains often contains pesticides, fertilizers, animal droppings, food wastes, automotive byproducts and other pollutants. Pollutants are also picked up in dry weather from sprinklers, sidewalk hosing, etc., which runs off streets, parking lots, and other impervious surfaces into the MS4. The pollutants in the runoff are

¹ See, 40 CFR §§122.26(d)(1)(ii); 122.26(d)(2)(i) and 122.22.

carried by a MS4 directly to the rivers, bays, beaches, and ocean waters of Southern California. The impact of this polluted runoff is seen in increased health risks to swimmers near storm drains and concentrations of toxic metals in harbor and ocean sediments, among other things. For these reasons, urban runoff from the MS4 has been targeted by the state and environmental groups as one of the largest sources of pollution to the waterways and coastal areas of Southern California.

Storm water discharges from MS4s throughout the urban areas of California are regulated under Section 402(p)² of the federal Clean Water Act (“CWA”) through “National Pollution Discharge Elimination System” (“NPDES”) permits. The primary objectives of the municipal NPDES storm water permitting program are to “effectively prohibit non-storm water discharges into storm sewers”; and “require controls to reduce the discharge of pollutants to the maximum extent practical, including management practices, control techniques and system, design and engineering methods, and other such provisions as the administrator or the state determines appropriate for the control of such pollutants.”³ The federal regulations implementing Section 402(p) of the CWA require municipalities to have controls to reduce the discharge of pollutants from their storm sewer systems.⁴

The CWA authorizes the United States Environmental Protection Agency (“USEPA”) to permit a state, such as California, to serve as the NPDES permitting authority in lieu of the USEPA. The State Board was granted that authority for its NPDES program in a Memorandum of Understanding with the USEPA, dated on September 22, 1989, which allows it to administer the NPDES Program governing point source discharges to waters of the United States.⁵ The Porter-Cologne Water Quality Control Act separately authorizes the State Board, through its Regional Boards, to regulate and control the discharge of pollutants into waters of the State.⁶

The first series of municipal NPDES permits were issued in Southern California in 1990 and primarily focused on addressing storm water pollution problems through the adoption of local ordinances aimed at controlling litter and illegal discharges into the MS4, along with similar measures.⁷ The first permits required the permittees to: (1) develop and implement storm water management and monitoring plans; (2) eliminate illegal and illicit discharges to the MS4s; and (3) adopt the necessary municipal

² 33 U.S.C. § 1342(p).

³ 33 U.S.C. § 1342(p)(3)(B)(iii).

⁴ See, 42 CFR § 122.26.

⁵ See, 54 FR 40664 (October 3, 1989).

⁶ See, Water Code §§ 13263 and 13374.

⁷ See, LA RWQCB Order No. 90-029 (NPDES No. CA 0061654 [CI 16948]) “Waste Discharge Requirements – Stormwater/Urban Runoff Discharge for Los Angeles County and Co-Permittees” (June 18, 1990).

ordinances to effectively prohibit such discharges. The overall goal of these requirements was to reduce pollutant loadings to surface waters from urban runoff to the maximum extent practicable (“MEP”). These first-round permits required the adoption of “Best Management Practices” (“BMP”) and initial monitoring with the expectation that “expanded or better-tailored BMPs in subsequent permits, where necessary, would provide for the attainment of water quality standards.”⁸

When the original municipal NPDES permits were renewed in the mid-1990s,⁹ the Regional Boards directed cities to adopt some development controls, as well as to increase their public education activities, and take steps to control contaminants entering the MS4s from public agency operations. The second term permits required continued implementation of storm water management and monitoring plans, and required the permittees to focus on those areas that threaten beneficial uses. Since then, high-profile news stories about beach closings, and pollution of rivers, bays and our ocean, have increased public awareness of the storm water pollution problem, and have led to further pressure by environmental groups and the public for state and local agencies to increase storm water pollution controls.

Responding to these concerns, the Regional Boards for the Los Angeles, San Diego and Santa Ana Regions have over the last year issued (or are in the process of adopting) renewed NPDES permits with much stricter controls for the discharge of storm water and urban runoff from MS4s in Los Angeles County¹⁰, North Orange County¹¹,

⁸ See, Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Rgtr. 57425 (1996).

⁹ See, Los Angeles Regional Board Order No. 96-054 (NPDES No. CAS614001) “Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles” (July 15, 1996), and Santa Ana Regional Board NPDES Order No. 96-31 (NPDES No. CAS 618030), “Waste Discharge Requirements for the County of Orange, Orange County Flood Central District and the Incorporated Cities of Orange County within the Santa Ana Region – Area wide Urban Storm Water Run-Off Orange County” (Mar. 8, 1996).

¹⁰ The Los Angeles Regional Board (the “RWQCB”) adopted as Order No 01-182 on December 13, 2001, which prescribes the new “Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the County of Los Angeles, and The Incorporated Cities Therein, Except The City of Long Beach” (NPDES No. CAS004001), in Los Angeles County (the “LA County Permit”). 88 Los Angeles Basin cities are co-permittees under the NPDES Permit; the County of Los Angeles is the principal permittee. The City of Long Beach has a separate, similar permit (Order No. 99-060; NPDES NO. CAS004003 (CI 8052)) which was issued in June 1999, as a part of its settlement with the SWRCB on the City’s lawsuit challenging the 1996 Los Angeles County NPDES permit.

¹¹ On January 18, 2002, the Santa Ana Regional Board adopted Order NO. 01-20; NPDES No. CAS618030, entitled “Waste Discharge Requirements for the County of

San Diego County¹², and Ventura County¹³. At the time this paper is being prepared, similar NPDES permits are scheduled for adoption in South Orange County¹⁴ and San Bernardino County.¹⁵

Orange, Orange County Flood Control District and The Incorporated Cities of Orange County Within the Santa Ana Region Areawide Urban Storm Water Runoff Orange County” (the "North Orange County Permit"). The permittees included in the North Orange County Permit are the County of Orange, the Orange County Flood Control District, the cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Garden Grove, Huntington Beach, Irvine, Laguna Woods, La Habra, La Palma, Lake Forest, Los Alamitos, Newport Beach, Orange, Placentia, Santa Ana, Seal Beach, Stanton, Tustin, Villa Park, Westminster and Yorba Linda.

¹² On February 21, 2001, the San Diego Regional Board adopted Order No. 2001-01; NPDES NO. CAS0108758, “Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining The Watersheds Of the County of San Diego, the Incorporated Cities of San Diego County, and the San Diego Unified Port District (the “San Diego Permit”).

¹³ The Los Angeles Regional Board adopted "Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges Within the Ventura County Flood Control District, the County of Ventura, and the Cities of Ventura County” (Order No. 00-108; NPDES Permit No. CAS004002) [the "Ventura County Permit"] in July 2000. The Permittees are Ventura County Flood Control District, the County of Ventura, and the Cities of Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura, Santa Paula, Simi Valley and Thousand Oaks.

¹⁴ The San Diego Regional Board has scheduled the “Waste Discharge Requirements for Discharges Of Urban Runoff From The Municipal Separate Storm Sewer Systems (MS4s) Draining The Watersheds Of the County of Orange, The Incorporated Cities of Orange County and the Orange County Flood Control District and Within the San Diego Region” (the "South Orange County Permit") for adoption on February 13, 2002 (Tentative Order No. R9-2002-0001, NPDES Permit No. CAS0108740). The permittees included in the South Orange County Permit are: the Cities of Aliso Viejo, Mission Viejo, Dana Point, Rancho Santa Margarita, Laguna Beach, San Clemente, Lake Forest, San Juan Capistrano, Laguna Hills, Orange, Laguna Niguel, and Laguna Woods, and the Orange County Flood Control District.

¹⁵ The Santa Ana Regional Board has scheduled the Draft Order R8-2002-0012, NPDES No. CAS618036, San Bernardino County, Department of Public Works, County of San Bernardino, and the Incorporated Cities of San Bernardino County within the Santa Ana Region, Area-wide Urban Storm Water Runoff Program (the “San Bernardino Permit”) for adoption on March 16, 2002. The San Bernardino permittees are the County of San Bernardino, and the cities of Big Bear Lake, Chino, Chino Hills, Colton, Fontana, Grand Terrace, Highland, Loma Linda, Montclair, Ontario, Rancho Cucamonga, Redlands, Rialto, San Bernardino, Upland, and Yucaipa.

Each of these new municipal NPDES permits include a variety of new storm water management and monitoring programs and planning requirements, including construction and development controls, controls on municipal activities, and controls on runoff from industrial, commercial, and residential sources, and public education. Their basic requirements are very similar with some regional adaptations. The types of controls and requirements included in the permits are also similar to those in prior MS4 permits, but also require, in many instances, a significant expansion of the storm water programs.

The Ventura County and San Diego County permits are already in effect. The Los Angeles County Permit became effective on February 1, 2002, at which time permittee cities in the Los Angeles Basin were required to begin implementing the programs specified in the permit. The permits covering North and South Orange County and portions of San Bernardino County will take effect by Spring of this year.

These lengthy permits contain a number of specific technical, engineering, and other requirements which the staff at most cities will be responsible for implementing. The purpose of this paper is to provide an overview of those portions of the new permits which city attorneys will need to be aware of since they will have a specific role in complying with new permits' requirements. Although these new permits may be subject to litigation,¹⁶ at the time of writing of this paper, none of the permits have been stayed by the SRWCB and cities will need to meet very clear deadlines for implementation.

One particular concern that many cities have raised regarding the new NPDES Permits is the deletion of the "Safe Harbor" provisions that were previously included in Discharge Prohibition and Receiving Water Limitations provisions of their current permits.¹⁷ These provisions provided cities with important protections from third-party liability once they implemented the storm water management programs prescribed by their NPDES permit.

Neither the "Discharge Prohibition" provisions nor the "Receiving Water Limitations" provisions of the new NPDES Permits provide clear assurance that, once a city has implemented the storm water management programs set forth in their NPDES permit in a timely and complete manner, a city will be deemed to be in compliance with the Discharge Prohibitions and Receiving Water Limitations provisions. As a result, cities may potentially be exposed to unwarranted third-party suits.

¹⁶ The SWRCB affirmed the San Diego Permit in November 2001 in In re Building Association of San Diego County, WQO-2001-15 (Nov. 16, 2001). However, on December 20, 2001, the petitioner filed suit in San Diego Superior Court. (Building Industry Assn., et al v. State Water Resources Control Board, Case No. GIC 780263.)

¹⁷ See, Part 1, Section I of the 1996 Los Angeles County Municipal Storm Water Permit, which provides "compliance with this Order through the timely development and implementation of programs described herein shall constitute compliance with this prohibition." See also, Part 1, Section II.

These concerns are not just academic. In Carson Harbor Village, Ltd. v. Unocal Corporation,¹⁸ the owner of the Carson Harbor Village mobile home park, which was allegedly contaminated by small quantities of lead contained in storm water runoff, sued the City of Carson, along with the County of Los Angeles, Caltrans, and Compton, under the CWA, CERCLA, RCRA and California common law. The federal district court granted Carson's motion for summary judgment, based on Carson's compliance with the 1990 and 1996 NPDES Permits and, in particular, the Safe Harbor provisions of those permits, whether the court held barred the CWA and state common law claims. That determination was recently affirmed on appeal.¹⁹

The deletion of these provisions is somewhat puzzling since the State Board specifically approved the inclusion of a “safe harbor” provision in a number of its own decisions.²⁰

B. LEGAL AUTHORITY

Section 402(p)(3)(B) of the CWA²¹ requires municipal storm water permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." Accordingly, each permit requires a City's ordinances to prohibit non-storm water discharges and establish legal authority to prohibit other types of discharges. Each of the permits also require a city to demonstrate that it has sufficient “legal authority,” that is, ordinances or other enforcement mechanisms, to ensure that the city can implement the requirements of its NPDES Permit.²²

Most cities have already adopted storm water ordinances as required by prior permits. However, some amendments will be necessary to conform to the requirements of the new permits. In particular, a city's ordinances must (1) specifically prohibit discharges of non-storm water and other illegal discharges and illicit connections to the MS4 (with certain exceptions),²³ (2) confirm that the city has the ability to enforce its

¹⁸ 990 F. Supp. 1188 (C.D. Cal 1997)

¹⁹ See, Carson Harbor Village, Ltd. v. Unocal Corporation, et al., 270 F.3d 865 (9th Cir. 2001).

²⁰ See, In re Environmental Health Coalition, WQ098-01 (1998); and In the Matter of the Petition of Save San Francisco Bay Assn., WQ096-13 (1996).

²¹ 33 U.S.C. §1342(p)(3)(B).

²² See, for example, Part 3.G. of the Los Angeles Permit at pp 21-23; and Part VI of the North Orange County Permit; South Orange County Permit, Part D.

²³ See, LA County Permit Part 3.G.1(2); North Orange County Permit, Part VI.1.0; South Orange County Permit, Section D.10.

ordinances, as well, and (3) demonstrate that the City has the capability to inspect facilities as required by their NPDES permit.²⁴

For example, Part 3.G.2 of the LA County Permit requires that “The Permittees shall possess adequate legal authority to:

- a) Require persons within their jurisdiction to comply with conditions in Permittees' ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows);
- b) Utilize enforcement mechanisms to require compliance with Permittees ordinances, permits, contracts, or orders;
- c) Control pollutants, including potential contribution, in discharges of storm water runoff associated with industrial activities (including construction activities) to its MS4 and control the quality of storm water runoff from industrial sites (including construction sites). This requirement applies to Source Control, and Treatment Control BMPs;

²⁴ Specifically, 40 CFR §§122.26 (d)(2)(i) states that a municipal permittee's application must provide the following:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

- (A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
- (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;
- (C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;
- (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;
- (E) Require compliance with conditions in ordinances, permits, contracts or orders; and
- (F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

- d) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions, including the prohibition of illicit discharges to the MS4. Permittees must possess authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities (including construction sites) discharging polluted or with the potential to discharge polluted storm water runoff into its MS4;
- e) Require the use of BMPs to prevent or reduce the discharge of pollutants to MS4s to MEP; and
- f) Require that Treatment Control BMPs be properly operated and maintained to prevent the breeding of vectors.”²⁵

Cities are also required to amend their codes to include the modified SUSMP requirements contained in the new permit.²⁶ South Orange County cities will be required to review and update their grading ordinances to conform with the new permit.²⁷

The North Orange County Permit and the San Bernardino County Permit require the cities to include sanctions, such as monetary penalties, in their ordinances.²⁸ There is no specific reference to the inclusion of specific monetary sanctions in the Los Angeles County Permit. However, permittee cities are required to obtain the necessary legal authority to comply with the permit through the adoption of ordinances and/or municipal code modifications that may include monetary penalties in their implementing ordinances.

The San Diego County Permit required permittees to amend their ordinances and submit their certifications of the permit’s adoption **within 180 days**, that is, by **February 21, 2001**.²⁹

Los Angeles County permittee cities have until **November 1, 2002** to amend their storm water ordinance to include all requirements of their new permit³⁰. Furthermore, each city must submit by no later than **December 2, 2002**, a new or updated statement by

²⁵ See also, Section D.1 of the South Orange County Permit and Section VI of the North Orange County Permit.

²⁶ Part 4.D.2(e) of the Los Angeles County Permit.

²⁷ South Orange County Permit, Section F.2.b; North Orange County Permit, Section XII.A.6.

²⁸ North Orange County Permit, Section VI.3; San Bernardino County Permit, Section VI.2.

²⁹ See, Part D.2 of the San Diego Permit.

³⁰ See, Part 3.G.3 of the LA County Permit.

its legal counsel that the city “has obtained all necessary legal authority to comply with this Order through adoption of ordinances and/or municipal code modifications.”³¹

South Orange County permittee cities will have to amend their ordinances and submit their certifications within a year of their permit’s adoption, that is, most likely, in **February 2003**.³²

North Orange County permittee cities have until **November 15, 2003** to amend their storm water and urban runoff ordinances and to submit the requisite certification by their city attorney.³³

If adopted, the San Bernardino County permittees will also have until **November 15, 2003** to amend their storm water and urban runoff water ordinances and to submit the requisite certification by their city attorneys.³⁴

From a city attorney’s standpoint, perhaps the most important aspect of each of these permits is their specific requirement that the city attorney **certify** that the city has the legal right to implement the permit. Certifications required by permits are typically required to comply with 40 CFR §122.22(d), and 122.41(k) and are made under penalty of perjury.³⁵ Considering the potential criminal and civil penalties for submitting an inaccurate certification, this requirement alone certainly focuses a city attorney’s attention on the NPDES permit.

C. LAND USE ISSUES

The new NPDES Permits contain a number of provisions that requiring cities to adopt or modify ordinances and policies for the review and approval of development and redevelopment projects.

1. Amendment of General Plan

The new NPDES Permits require cities to amend elements of their General Plan, including their land use elements to consider storm water impacts during planning process.

a. Los Angeles County – Part 4, Section D.12. Each permittee is required to amend its General Plan to include watershed and storm water quality and

³¹ See, Part 3.G. 4 of the LA County Permit.

³² See, Part D.2 of the South Orange County Permit

³³ See, Part VI.3 and 4 of the North Orange County Permit.

³⁴ See, Part VI, 3 and 4 of the San Bernardino County Permit.

³⁵ See, LA County Permit, Part 6.H; North Orange County Permit, Section VI.4; San Bernardino County Permit, Section VI.6; and San Diego County Permit, Section D.2.

quantity management considerations and policies when revising or amending the Land Use, Housing, Conservation, and Open Space elements of the General Plan.³⁶

b. South Orange County - Section F.1.a requires the permittees to assess their General Plan within one year of adoption of the permit (that is, February 2003) to ensure that it includes water quality and watershed protection principles to direct land-use decisions and require implementation of consistent water quality protection measures for development projects.³⁷

c. San Bernardino County - Section XII.A.5. requires each permittee to review their General Plan process to ensure that storm water-related issues are properly addressed.

d. San Diego County - Section F.1.a. San Diego County permittees were required to assess their General Plan within one year of adoption of the permit (that is, by February 21, 2002), to ensure that the plan included water quality and watershed protection principles to direct land-use decisions and require implementation of consistent water quality protection measures for development projects.

3. CEQA Process

Cities will also be required to incorporate into their CEQA process procedures for considering potential storm water quality impacts and providing for appropriate mitigation when preparing and reviewing CEQA documents. Notably, nothing in the permits addresses how these new factors correspond or correlate to either CEQA Guidelines or the Environmental Checklist Forms.³⁸ Moreover, the Regional Boards do not appear to have considered that their unilateral modification of these procedures may have required rulemaking first.

Putting aside these issues, a city's CEQA procedures will have to consider, among other things, the following matters:

- (1) Potential impact of project construction on storm water runoff;
- (2). Potential impact of project post-construction activity on storm water runoff;
- (3) Potential for discharge of storm water from areas from material storage, vehicle or equipment fueling, vehicle or equipment maintenance (including washing), waste handling, hazardous materials handling or storage, delivery areas or loading docks, or other outdoor work areas;

³⁶ Los Angeles County Permit, Part 4.D.12.

³⁷ See, 14 CCR § 15369, defining "ministerial projects."

³⁸ See, 14 CCR § 15063(f) and Appendices G and H to the CEQA Guidelines.

(4) Potential for discharge of storm water to impair the beneficial uses of the receiving waters or areas that provide water quality benefit;

(5) Potential for the discharge of storm water to cause significant harm on the biological integrity of the waterways and water bodies;

(6) Potential for significant changes in the flow velocity or volume of storm water runoff that can cause environmental harm; and

(7) Potential for significant increases in erosion of the project site or surrounding areas.³⁹

a. Los Angeles County – Part 4, Section D.11. Each permittee is required to amend its CEQA processes *immediately* to consider potential storm water quality and providing appropriate mitigation measures when preparing and reviewing CEQA documents and Use, Housing, Conservation, and Open Space elements of the General Plan.⁴⁰

b. North Orange County - Section XIII.3 requires each permittee to review their CEQA document review process by December 19, 2002, to ensure that urban runoff-related issues are properly considered.

c. South Orange County - Section F.1.c requires the permittee cities to revise their CEQA review process within one year of adoption of the permit (that is, February 2003) to include evaluation of water quality effects and identifying appropriate mitigation measures. The section includes a list of 11 questions focusing on water quality issues.

d. San Diego County - Section F.1.c(1) of the permit required San Diego County permittees were required to revise their CEQA review process within one year of adoption of the permit (that is, by February 21, 2002 to include evaluation of water quality effects and identifying appropriate mitigation measures.

e. San Bernardino County – Sections XII.A.5 and 6 require each permittee to review their CEQA document review process within 120 days of adoption (i.e., by June 2001), to ensure that storm water-related issues are properly addressed.

4. Mitigation Plans for Control of Post-Construction Runoff

Among the most contentious provisions of the new permits is the inclusion of “Standard Urban Storm Water Mitigation Plans (“SUSMP’s”) or their functional

³⁹ Los Angeles County Permit, Part 4.D.11; North Orange County Permit, Section XII.A.2 and XII.A.3; South Orange County Permit, Section F.1.c.; San Bernardino County Permit, Section XII.A.6.f; and San Diego County Permit, Section F.1.c.

⁴⁰ Los Angeles County Permit, Part 4.D.12.

equivalents which require designated development and redevelopment projects to include a prescribed storm water mitigation plan and treatment facilities as part of the development plans before the project could be approved by the city.⁴¹ Currently, discharges of runoff from construction sites are subject to the SWRCB's Statewide Construction Permit. The General Construction Permit⁴² requires the site owner or developer to notify the State Board, by filing a "Notice of Intent" to comply with the General Permit, to prepare and implement a Storm Water Pollution Prevention Plan, ("SWPPP") and to monitor the effectiveness of the plan. The SWPPP must also address post-construction control of pollutants in storm water, to some extent.

The development controls of the SUSMP's in the new NPDES Permits, on the other hand, focus on post-construction runoff. They are aimed at limiting not just the pollutants in runoff from the new development, but also the volume of runoff that enters the MS4. By limiting runoff from new development, the new NPDES Permits seek to prevent increased impacts from urban runoff. The State Board affirmed most of the SUSMP requirements in 2000.⁴³

Basically, a SUSMP requires developers of larger housing tracts, hillside residences, commercial developments, auto repair shops and gas stations, parking lots and restaurants to (1) include structural treatment control measures that will retain a specified amount of storm water onsite; and (2) incorporate certain "Best Management Practices" ("BMP's") into the design of their project to significantly reduce the amount of storm water run-off entering the MS4.

The new NPDES Permits typically require a SUSMP for the following categories of development projects:

- (a) Single Family Hillside Residences;
- (b) 100,000 square foot Commercial Developments;
- (c) Automotive Repair Shops;
- (d) Retail Gasoline Outlets;
- (e) Restaurants;
- (f) Home Subdivisions of more than 10 units;

⁴¹ Los Angeles County Permit, Section 4.D.2; North Orange County Permit, Section XII.B; South Orange County Permit, Section F.1.b.2; San Bernardino County Permit, Section XII.B; San Diego County Permit, Section F.1.b.2.

⁴² National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity (General Permit) WQO 99-08-DWQ, as modified by State Board Resolution No. 2001-046.

⁴³ In re Cities of Bellflower, et al., WQO 2000-11.

- (g) “Redevelopment Projects” that meet certain thresholds;⁴⁴
- (h) Parking lots of 5,000 square feet more of surface area or 25 more parking spaces; and
- (i) Developments in environmentally-sensitive areas.

Construction on sites of less than five acres that are part of a larger project that covers more than five acres also must comply.

Permittee cities are required to implement programs to control runoff from construction activity at all construction sites within their jurisdiction.⁴⁵ The programs are required to, among other things, control erosion and for sites of more than one acre, require a “Local Storm Water Pollution Prevention Plan” (“Local SWPPP”), which must be certified by the property owner or its agent approved prior to the issuance of a grading permit for construction projects.⁴⁶ For sites greater than five acres, a city must require, prior to issuing a grading permit (1) proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for coverage under the GCASP and a certification that a SWPPP has been prepared by the project developer.⁴⁷

Moreover, the new permits’ SUSMP requirements do not just apply to new developments; they also apply to certain defined “redevelopment projects”, specifically, those which result in the creation or addition of at least 5,000 square feet of impervious surfaces, that is, expansion of a building footprint; addition or replacement of a structure; exterior construction or remodeling; or replacement of impervious surfaces) that are not routine part of maintenance.

Los Angeles County cities must require the implementation of SUSMP and post-construction control requirements for industrial or commercial development category to projects that disturb one acre or more of surface area by not later than March 10, 2003.⁴⁸

For projects requiring a SUSMP, the city must require a “maintenance agreement” that assigns responsibility for the maintenance of post-construction treatment control facilities.⁴⁹

⁴⁴ Los Angeles County Permit, Part 4.D.2; North Orange County Permit, Section XII.B.1; San Bernardino County Permit, Section XII.B.1; South Orange County Permit, Section F.1; and San Diego Permit, Section F.1.

⁴⁵ Part 4.E.1. of the Los Angeles County Permit.

⁴⁶ Part 4.E.2 (a) of the Los Angeles County Permit.

⁴⁷ Part 4.E.3 of the Los Angeles County Permit.

⁴⁸ Part 4.D.5 of the Los Angeles County Permit.

⁴⁹ Part 4.E.3 of the Los Angeles County Permit.

Los Angeles County Cities must also impose controls by no later than September 1, 2002 on new development and redevelopment projects that do **not** otherwise require a SUSMP that have certain features such as vehicle maintenance or fueling areas or commercial or industrial waste handling or storage⁵⁰.

SUSMP requirements were also extended to “Significant Redevelopment” projects⁵¹, defined as the “the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site” or “an alteration to more than fifty percent of impervious surfaces of a previously existing development”. Existing single family structures are exempt from these requirements.⁵²

Furthermore, cities are directed to require the implementation of SUSMP provisions **no later than September 2, 2002**, for all projects located in or directly adjacent to or discharging directly to an “Environmentally Sensitive Area”⁵³ where the development will: (1) impact a sensitive biological species or habitat; and (2) Create 2,500 square feet or more of impervious surface area.⁵⁴

The design standards in the SUSMP portions of the new permits typically require that the specified developments be designed to mitigate storm water runoff (by treatment or infiltration) from one of the following:

- “1. The 85th percentile 24-hour runoff event determined as the maximized capture storm water volume for the area..., or
2. The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment..., or
3. The volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system, or

⁵⁰ Part 4.D.6 of the Los Angeles County Permit.

⁵¹ “Redevelopment” is defined as meaning “land-disturbing activity that results in the creation, addition, or replacement of 5,000 square feet or more of impervious surface area on an already developed site. Redevelopment includes, but is not limited to: the expansion of a building footprint; addition or replacement of a structure; replacement of impervious surface area that is not part of a routine maintenance activity; and land disturbing activities related to structural or impervious surfaces. “

⁵² Part 4.D.7 of the Los Angeles County Permit.

⁵³ “Environmentally Sensitive Areas (ESAs)” are defined as “an area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments (California Public Resources Code § 30107.5). See, Part 5 of the LA County Permit at page 55 .

⁵⁴ Part 4.D.6 of the Los Angeles County Permit.

4. The volume of runoff produced from a historical-record based reference 24-hour rainfall criterion for “treatment” (0.75 inch average for the Los Angeles County area) that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event.”⁵⁵

5. Application to Non-Discretionary Projects.

Most of the NPDES Permits require a city to prescribe storm water requirements for certain described discretionary and ministerial projects. The new NPDES Permits also contain broad definitions for “development” and “redevelopment” which greatly extend the scope of the proposed controls. However, development controls usually only apply to “discretionary projects”, as those projects are defined in Section 15357 of the “Guidelines for Implementation of the California Environmental Quality Act,”⁵⁶ which applies to projects requiring the exercise of judgment or deliberation by a city in connection with a decision to approve or disapprove the project, as distinguished from situations where the city merely must determine whether there has been conformity with applicable statutes, ordinances, or regulations. Significant questions arise as to whether a city is capable of imposing the storm water control requirements on non-discretionary or ministerial projects, such as the issuance of a building permit on a project where entitlements have already been granted and where the issuance of the permit is simply a ministerial act by the city.

Cities do not have a complete free hand in imposing design criteria on all projects. For example, building permits historically been viewed as a ministerial act, so long as the applicant complied with building codes and regulations.⁵⁷ Typically, a city is not allowed to impose new restrictions after all discretionary approvals have been obtained by project developer. For that reason, the 1996 Municipal NPDES Permit only applied the SUSMP to “discretionary projects”. However, the new permits fail to make that distinction and seek to apply the SUSMP to all defined projects, whether or not any discretionary approvals were necessary.

The State Board previously addressed this issue and held in its 2000 order on the Bellflower petition, which challenged the original Los Angeles County SUSMP requirements, that, taken as a whole, appeared to link the developmental requirements of a SUSMP to “discretionary” developments, as defined in CEQA. Accordingly, the State Board limited the SUSMP to apply to development projects requiring “discretionary” approval by a city within the meaning of CEQA. However, the State Board indicated in its order that a Regional Board could consider expanding the development controls

⁵⁵ Los Angeles County Permit, Part 4.D.3; North Orange County Permit, Section XII.B.3; San Bernardino County Permit, Section XII.B.3; South Orange County Permit, Section F.1.b.(c); and San Diego County Permit, Section F.1.b.(c).

⁵⁶ 14 CCR § 15357.

⁵⁷ See, Section 15369 of the CEQA Guidelines (14 CCR 15369).

beyond CEQA discretionary projects when it reissued the Municipal NPDES Permit.⁵⁸ The Regional Boards have taken that opportunity in the new permits.

D. INSPECTION AND INVESTIGATION REQUIREMENTS

Another controversial aspect of the new NPDES Permits is the requirement that cities inspect certain industrial and commercial facilities within their boundaries, even though such facilities may already be regulated by the Regional Board itself pursuant to its Statewide General Industrial permits.⁵⁹ The new inspection programs have raised concerns about the ability of the cities to gain access to properties for inspections, the costs of legal enforcement, among other issues.

Part 3.G.d. of the LA County Permit requires permittee cities to have the legal authority to “carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions, including the prohibition of illicit discharges to the MS4.” That section also requires a city to have the authority in its storm water ordinance “... to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities (including construction sites) discharging polluted or with the potential to discharge polluted storm water runoff into its MS4.”⁶⁰

Unlike prior permits, the new series of permits require cities to actually conduct inspections⁶¹ of:

1. Restaurants;
2. Automotive service facilities;
3. Retail gasoline outlets
4. Automotive dealerships
5. “Phase I Facilities”, such as municipal landfills, oil and gas production sites; manufacturing facilities, etc.⁶²; and
6. “Other Federally-Mandated Facilities.

⁵⁸ Supra, WQO 2000-11.

⁵⁹ State Board WQO No. 97-03-DWQ – National Pollutant Discharge Elimination System (NPDES) General Permit No. Cas000001 (General Permit) – “Waste Discharge Requirements (WDRS) For Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities.”

⁶⁰ See also, South Orange County Permit, Section D.1.h; and San Diego County Permit, Section D.1.h.

⁶¹ Part 4.C.2 of the Los Angeles County Permit.

⁶² See, Attachment B-1 to the Los Angeles County Permit, entitled “Critical Source Categories”.

In addition to the designated industrial and commercial facilities, cities are required to "...inspect all construction sites for storm water quality requirements during routine inspections a minimum of once during the wet season, and to follow up on the inspections to ensure that compliance has been achieved."⁶³

1. Restaurant Inspection Program

Each permit requires cities to develop a restaurant inspection program.

a. Los Angeles County Permit - Part 4, Section C.2(1). This section requires each permittee to inspect restaurants within its jurisdiction twice during the 5-year term of the permit. The first inspection is to occur no later than August 1, 2004 with a minimum interval of one year in between the first and second inspection.

b. North Orange County Permit - Section VI.7. This section requires each permittee to develop a restaurant inspection program to address oil and grease disposal, tracer, grease traps, and related cleaning and disposal methods by July 1, 2002.

c. South Orange County Permit – There are no specific inspection requirements for restaurants under this permit.

d. San Bernardino County Permit – VI.5. This section requires each permittee to develop a restaurant inspection program to address oil and grease disposal, tracer, grease traps, and related cleaning and disposal methods by November 15, 2002.

e. San Diego County Permit – There are no specific inspection requirements for restaurants under this permit.

2. Gasoline Stations

Cities will also be required to inspect restaurants and gas stations for storm water compliance.

a. Los Angeles County Permit - Part 4, Section C.2(3). Under this section, each permittee shall inspect restaurants within its jurisdiction twice during the 5-year term of the permit. The first inspection is to occur no later than August 1, 2004 with a minimum interval of one year in between the first and second inspection. Each permittee shall confirm that BMPs are being effectively implemented at each gasoline station.

b. North Orange County Permit - Section X.1(a). Under this section, each permittee shall develop by July 1, 2003, an inventory of commercial facilities including gasoline stations. After July 1, 2003, each permittee shall establish inspection

⁶³ Part 4.E.2(b) of the Los Angeles County Permit.

frequencies and priorities. By July 1, 2004, all high priority facilities are required to be inspected at least once.

c. South Orange County Permit -Finding 44. This section states that gasoline stations are significant sources of pollutants in urban runoff. Structural treatment BMPs are required at gasoline stations with 5,000 or more square feet.

d. San Bernardino County Permit - Section X.1(a). Under this section, each permittee shall develop by July 1, 2003, an inventory of commercial facilities including gasoline stations. After July 1, 2003, each permittee shall establish inspection frequencies and priorities. By July 1, 2004, all high priority facilities are required to be inspected at least once.

3. Industrial Facilities

a. Los Angeles County Permit- Part 4.C. Each permittee is required to carry out inspections of all inventoried facilities. The inspections are required to be conducted no later than August 1, 2004. Each facility shall be inspected twice during the five-year term of the permit.

b. North Orange County Permit - Section IX. By July 1, 2003, each permittee shall develop an inventory of industrial facilities within their jurisdiction that have potential to contribute to the MS4. All high priority facilities are required to be inspected by July 1, 2003. After July 1, 2003, all high priority sites are required to be inspected twice during the five-year term of the permit, medium sites at least once every two years, and low priority sites once per permit cycle.

c. South Orange County Permit – Section F.3.b(6). Co-permittees are required to conduct industrial site inspections for compliance with its ordinances, permits and this Order. Each co-permittee will establish inspection frequencies and priorities and will inspect high priority industrial sites annually or bi-annually as determined by the threat to water quality, and medium and low threat sites as needed.

d. San Bernardino County Permit – Section IX. By July 1, 2003, each permittee shall develop an inventory of industrial facilities within their jurisdiction that have potential to contribute to the MS4. All high priority facilities are required to be inspected by November 15, 2003. After July 1, 2003, all high priority sites are required to be inspected twice during the five-year term of the permit, medium sites at least once every two years, and low priority sites once per permit cycle.

e. South Orange County Permit – Section F.3.b(6). Co-permittees are required to conduct industrial site inspections for compliance with its ordinances, permits and this Order. Each co-permittee will establish inspection frequencies and priorities and will inspect high priority industrial sites annually or bi-annually as determined by the threat to water quality, and medium and low threat sites as needed.

The permits also require city staff to initiate investigations of complaints within one business day.⁶⁴ Upon discovering an “illicit discharge” to the MS4, city staff are also required initiate an investigation within one business day.⁶⁵ Upon discovering an “illicit connection” to the MS4, city staff are required initiate an investigation within 21 days and terminate the connections within 180 days.⁶⁶ Lastly, a city is required to report “...any noncompliance that may endanger health or the environment... “orally within 24 hours with a written report within five days.⁶⁷

In addition to inspections, cities are required institute progressive enforcement actions, including referrals to the Regional Board of violations.⁶⁸ Cities are also required to support Regional Board enforcement actions.⁶⁹

Conclusion

The many different new requirements set forth in the new NPDES Permits will require city attorneys to review their existing ordinances to ensure that their city has the ability to implement and enforce the requirements of the new NPDES permits. The certification requirements of each of these permits and the penalties associated with making an inaccurate statement will require careful scrutiny by city attorneys of their storm water ordinances and programs.

⁶⁴ Part 4.C.3.d(3) of the Los Angeles County Permit.

⁶⁵ Part 4.G.3(a) of the Los Angeles County Permit.

⁶⁶ Part 4.G.2(b) of the Los Angeles County Permit.

⁶⁷ Part 6.L. of the Los Angeles County Permit.

⁶⁸ Part 4.C.3.d (1) and (2) and Part 4.E.4 of the Los Angeles County Permit.

⁶⁹ Part 4.C.3.d (4) of the Los Angeles County Permit.